

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

AUG 12 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0154-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
JAMES MICHAEL VIVONA,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092919001

Honorable John S. Leonardo, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Law Office of Ronald Zack  
By Ronald Zack

Tucson  
Attorney for Petitioner

B R A M M E R, Presiding Judge.

¶1 Petitioner James Vivona challenges the trial court's summary dismissal of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. We grant review, and, for the following reasons, deny relief.

¶2 Pursuant to a plea agreement, Vivona was convicted of theft of a means of transportation. The trial court sentenced him to an aggravated, 7.5-year term of imprisonment. In an of-right petition for post-conviction relief, *see* Ariz. R. Crim. P. 32.1, Vivona alleged his counsel had rendered ineffective assistance by failing to present evidence of Vivona’s mental illness as a mitigating factor at sentencing and by failing to object to the court’s order that Vivona pay \$400 for the legal services he had received. Vivona also maintained the court’s order assessing fees for legal services was unlawful. The court summarily dismissed Vivona’s petition, and this petition for review followed.

¶3 On review, Vivona relies on the same arguments he raised below. We will not disturb a trial court’s summary denial of post-conviction relief absent an abuse of the court’s discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). We find none here.

¶4 In its well-reasoned ruling, the trial court identified and correctly resolved Vivona’s claims of ineffective assistance of counsel. We need not repeat the court’s reasoning here; instead, we adopt it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). The court did not, however, address directly Vivona’s challenge to the legality of the court’s order assessing legal fees to offset the cost of services provided by the public defender. Because we conclude this claim is not cognizable under Rule 32, the court’s omission does not alter our determination that Vivona’s petition was properly dismissed.

¶5 A reimbursement order entered pursuant to A.R.S. § 11-584(C)(3) and Rule 6.7(d), Ariz. R. Crim. P., is neither a penalty nor a criminal sanction.<sup>1</sup> *See State v.*

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<sup>1</sup>Recent amendments to § 11-584 are not material to Vivona’s claim. *See* 2010 Ariz. Sess. Laws, ch. 195, § 1. When the court directed him to pay \$400 to offset the cost of legal services, the authority for that order was found in § 11-584(B)(3). *See* 2003 Ariz. Sess. Laws, ch. 15, § 1.

*Connolly*, 216 Ariz. 132, ¶ 3, 163 P.3d 1082, 1082-83 (App. 2007). Nor is such an assessment dependent upon a determination of guilt. *See* § 11-584(C)(3); Ariz. R. Crim. P. 6.7(d). Accordingly, a reimbursement order is not part of a criminal “sentence.” *See* Ariz. R. Crim. P. 26.1(b) (“The term sentence means the pronouncement by the court of the penalty imposed upon the defendant after a judgment of guilty.”). Although a defendant may challenge an allegedly illegal sentence in a Rule 32 proceeding, *see* Ariz. R. Civ. P. 32.1(c), that rule provides no ground for relief from an order directing reimbursement of legal fees. *Cf. State v. Soto*, 223 Ariz. 407, ¶ 9, 224 P.3d 223, 226 (App. 2010) (compared to Rule 32 claims available to pleading defendants, non-pleading defendants afforded “considerably broader” range of appellate claims on review).

¶6 For the reasons stated above and in the trial court’s thorough ruling, the court did not abuse its discretion in summarily dismissing Vivona’s petition. Accordingly, we grant review, but deny relief.

/s/ J. William Brammer, Jr.

J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge